Supreme Court, U.S.
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No.

In the Supreme Court of the United States

Dianna Clark,

Petitioner

v.

Redland Insurance Company,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The aftermath of *Matsushita Electric Industrial Co. v. Zenith Radio Corp*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) has spawned a 'rush to (summary) judgment' in federal trial courts, and a corresponding vanishing of jury trials. In the rush to summary judgment in federal trial courts the procedural rights of litigants afforded by the Federal Rules of Civil Procedure are increasingly trampled upon. The questions presented are as follows:

1. Does a local district court rule that prevents a claimant from filing a motion for summary judgment *after* service of an adverse party's motion for summary judgment violate Federal Rule of Civil Procedure 56(a)'s mandate that a claimant may file a motion for summary judgment "after service of a motion for summary judgment by the adverse party"?

2. What is the proper resolution of the conflict and confusion in the circuits as to whether local district court rules, which do not provide at a minimum for a party to request an oral hearing on a motion for summary judgment, violate the hearing requirement of Federal Rule of Civil Procedure 56(c) and are in derogation of Federal Rule of Civil Procedure 78?

3. Does the excusable neglect standard and analysis of *Pioneer Investment Services Co. v. Brunswick Associates Ltd.*, 507 U.S. 380 (1993) apply to the Federal Rules of Civil Procedure; particularly, in the context of timeliness of an

affidavit, or sworn declaration, submitted in response to an adverse party's motion for summary judgment?

4. In a diversity jurisdiction case, transferred under United States Code, title 28, section 1404(a) from a district court in one state to a district court in another state, is the transferee court obligated to properly apply the conflict of laws rules of the transferor state under *Ferens v. John Deere Company*, 494 U.S. 516 (1990) and *Van Dusen v. Barrack*, 376 U.S. 612 (1964)?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	1
STATEMENT	2
REASONS FOR GRANTING THE PETITION	6

1. A LOCAL COURT RULE PREVENTING A CLAIMANT FROM FILING A MOTION FOR SUMMARY JUDGMENT *AFTER* SERVICE OF AN ADVERSE PARTY'S MOTION FOR SUMMARY JUDGMENT VIOLATES FEDERAL RULE OF CIVIL PROCEDURE 56(a)'S MANDATE THAT A CLAIMANT MAY FILE A MOTION FOR SUMMARY JUDGMENT "AFTER SERVICE OF A MOTION FOR SUMMARY JUDGMENT BY THE ADVERSE PARTY" 7

2. LOCAL COURT RULES OF A FEDERAL TRIAL COURT, WHICH DO NOT PROVIDE – AT A MINIMUM - FOR A PARTY TO REQUEST AN ORAL HEARING ON A MOTION FOR SUMMARY JUDGMENT, VIOLATE THE HEARING REQUIREMENT OF FEDERAL RULE OF CIVIL PROCEDURE 56(c) AND ARE IN DEROGATION OF FEDERAL RULE OF CIVIL PROCEDURE 78 10

3. THE EXCUSABLE NEGLECT STANDARD AND ANALYSIS OF *PIONEER INVESTMENT SERVICES CO. V. BRUNSWICK ASSOCIATES LTD.*, 507 U.S.

380 (1993) APPLIES TO FEDERAL RULES OF CIVIL PROCEDURE; PARTICULARLY, IN THE CONTEXT OF THE TIMELINESS OF AN AFFIDAVIT, OR SWORN DECLARATION, SUBMITTED IN RESPONSE TO AN ADVERSE PARTY'S MOTION FOR SUMMARY JUDGMENT 15

4. IN A DIVERSITY JURISDICTION CASE TRANSFERRED UNDER UNITED STATES CODE, TITLE 28, SECTION 1404(a) FROM A DISTRICT COURT IN ONE STATE TO A DISTRICT COURT IN ANOTHER STATE, THE TRANSFEREE COURT IS OBLIGATED TO PROPERLY APPLY THE CONFLICT OF LAWS RULES OF THE TRANSFEROR FORUM ... 17

CONCLUSION 21
APPENDIX A 1a
APPENDIX B 7a
APPENDIX C 9a
APPENDIX D 16a
APPENDIX E 18a
APPENDIX F 20a
APPENDIX G 28a

TABLE OF AUTHORITIES

Cases: **Page**

Supreme Court of the United States:

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) ..... i, 6

Atkins v. Virginia,
536 U.S. 304 (2002) 14

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) ..... i, 6

Edmonson v. Leesville Concrete Co., Inc.,
500 U.S. 614 (1991) 14

Ferens v. John Deere Co.,
494 U.S. 516 (1990) ..... ii, 17, 20

Hanna v. Plumer,
380 U.S. 460 (1965) 9

Hiersche v. U.S.,
503 U.S. 923 (1992) 14

Matsushita Electric Industrial Co. v. Zenith Radio Corp,
475 U.S. 574 (1986) ..... i, 6

Mistretta v. U.S.,
488 U.S. 361 (1989) 14

Cases: Supreme Court of the United States (cont.): Page

Pioneer Investment Services Co. v. Brunswick Associates Ltd.,
507 U.S. 380 (1993) ..... i, 15, 16

Van Dusen v. Barrack,
376 U.S. 612 (1964) ..... ii, 17, 20

United States Courts of Appeals:

AD/SAT, A Division of Skylight, Inc. v. Associated Press,
181 F.3d 216 (2nd Cir. 1999) 10

Brown v. Crawford County, Ga.,
960 F.2d 1002 (11th Cir. 1992) 9

Clark v. Redland Insurance Co.,
No. 04-10604, slip op.
(11th Cir. Aug. 18, 2004) ..... *passim*

Coady v. Aguadilla Terminal Inc.,
456 F.2d 677 (1st Cir. 1972) 10

Dredge Corp. v. Penny,
338 F.2d 456 (9th Cir. 1964) 10, 15

Finn v. Gunter,
722 F.2d 711 (11th Cir. 1984) 10

International Business Machines Corp. v. Liberty Mutual Insurance. Co.,
363 F.3d 137 (2nd Cir. 2004) 18, 19, 20

Cases (cont.): **Page**

United States District Courts:

Clark v. Redland Ins. Co.,
Civ. Action No. 1:02-cv-3514-GET
(N.D. Ga. Jun. 20, 2003) ..... *passim*

State Courts:

Anderson v. Southeastern Fidelity Insurance Co.,
251 Ga. 556, 307 S.E.2d 499 (Ga. 1983) 18, 19

Greaves v. Public Service Mutual Insurance Co.,
5 N.Y.2d 120, 155 N.E.2d 390 (N.Y. 1959) 19

Planet Insurance Co. v. Bright Bay Classic Vehicles, Inc.,
75 N.Y.2d 394, 553 N.E.2d 562
(N.Y. 1990) 18, 19, 20

Statutes:

28. U.S.C. 620(a) 14

28 U.S.C. 1254 1

28 U.S.C. 1332(a) 2

28 U.S.C. 1404(a) ..... ii, 1, 3, 17, 18

Federal Rules of Civil Procedure: **Page**

Fed. R. Civ. P. 1 7

Fed. R. Civ. P. 56 ..... 1, 8

Fed. R. Civ. P. 56(a) ..... i, 7, 8, 9

Fed. R. Civ. P. 56(c) ..... i, 10,11, 17

Fed. R. Civ. P. 78 ..... i, 1, 10, 11, 13

Fed. R. Civ. P. 83 9

Local Rules of Courts:

N. Dist. Ga. Loc. R. 7.1 1

N. Dist. Ga. Loc. R. 7.1(B) 15

N. Dist. Ga. Loc. R. 7.1(E) 12

N. Dist. Ga. Loc. R. 56.1 ..... 1, 12

N. Dist. Ga. Loc. R. 56.1(C) 3, 8, 9, 16

S. Dist. Ga. Loc. R. 7.2 12

Court Documents:

Brief of Appellant, Dianna Clark,
Clark v. Redland Insurance Co.,
No. 04-10604, (11th Cir. Aug. 18, 2004) ... 5

Court Documents (cont.): **Page**

Notice to Respond to S.J. Mot.,
Clark v. Redland Ins. Co.,
Civ. Action No. 1:02-cv-3514-GET
(N.D. Ga. Jun. 20, 2003) 13, 15

Treatises, Studies, and other documents:

Arthur R. Miller, *The Pretrial Rush To Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day In Court and Jury Trial Commitments?*,
78 N.Y.U. L. Rev. 982 (2003) 6

Edward J. Devitt, *Effective Judicial Management of Motion Practice*, 91 F.R.D. 153 (1981) 13, 14

Journal of Empirical Legal Studies,
vol. 1, issue 3 (Nov. 2004) 6

Paul R.J. Connolly & Patricia A. Lombard, *Judicial Controls and The Civil Litigation Process: Motions* (Federal Judicial Center 1980) 13, 14

ABA, *Program Book, Annual Meeting – August 5-10, 2004 – Atlanta*, (ABA 2004) 6

PETITION FOR A WRIT OF CERTIORARI

Dianna Clark, petitioner, respectfully requests the Court review on a writ of certiorari the judgment of the United States Court of Appeals for the Eleventh Circuit (hereinafter "Eleventh Circuit") in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit (App. A, *infra*, 1a); the order of the Eleventh Circuit denying rehearing and rehearing en banc (App. B, *infra*, 7a); and, the relevant decisions of the trial courts (App. C, *infra*, 9a; App. E, *infra*, 18a) are unreported.

JURISDICTION

The Eleventh Circuit entered judgment on August 18, 2004. (App. A, *infra*, 1a). On October 25, 2004, the Eleventh Circuit denied rehearing and rehearing en banc. (App. B, *infra*, 7a). Petitioner has timely petitioned this Court for a writ of certiorari to the Eleventh Circuit. This Court has jurisdiction under United States Code, title 28, section 1254.

STATUTES AND REGULATIONS INVOLVED

Federal Rule of Civil Procedure 56 is reproduced below in the Appendix (App. E, *infra*, 22a-24a), as is Rule 78 (App. F, *infra*, 24a). United States Code title 28, section 1404(a) is reproduced below (App. F, *infra*, 20a). Also, reproduced below are Local Court Rules 7.1 and 56.1 of the Northern District of Georgia (App. F, *infra*, 25a-28a).

STATEMENT

Invoking diversity jurisdiction under United States Code title 28, section 1332(a), Dianna Clark filed suit in the United States District Court for the Southern District of New York, against respondent, Redland Insurance Company (hereinafter "Redland"). Clark's complaint sought a declaratory judgment that Redland was indebted to her, under a Redland policy of automobile liability insurance, for the full amount of a Georgia state court judgment she had obtained against the named insured in the Redland insurance policy.

Clark had sustained bodily injuries in a motor vehicle collision in Atlanta, Georgia involving an automobile owned by Redland's named insured and leased to a third-party. Clark filed a personal injury lawsuit against Redland's named insured and others in a Georgia state court. The Georgia state court entered a judgment for Clark and against Redland's named insured, in the principal amount $771,600, plus interest and costs.

Clark subsequently filed her complaint seeking declaratory judgment against Redland in the United States District Court for the Southern District of New York. Clark's complaint sought a judgment declaring Redland was indebted to her under the Redland policy of automobile insurance for the full amount of Clark's Georgia state court judgment against Redland's named insured.

Redland answered Clark's complaint for declaratory judgment. Redland also filed a motion to dismiss the complaint; alternatively, Redland moved to transfer the case to a district court in Georgia pursuant to United States Code

title 28, section 1404(a). The New York district court granted the motion to transfer and the case was transferred to the United States District Court for the Northern District of Georgia. (App. E, *infra*, 18a-19a).

Following transfer of the case to Georgia, Redland moved for summary judgment on Clark's complaint. A local court rule of the Northern District of Georgia requires that all motions for summary judgment be filed within twenty days of the close of the discovery period. N. Dist. Ga. Loc. R. 56.1(C) (reproduced at App. F, *infra*, 28a). Redland filed its motion for summary judgment on the last day of the twenty-day period. Redland served its motion on Clark by mail on the same day it filed its motion thereby assuring Clark would not receive the motion until after the twenty-day period for filing motions for summary judgment had expired under the local court rule. Clark filed a response to Redland's motion for summary judgment.

The Northern District of Georgia local rules (App. F, *infra*, 25a-28a) and a standing notice issued by the court clerk upon the filing of a motion for summary judgment (App. F, *infra*, 16a), make clear that a summary judgment motion will be decided without an oral hearing. Moreover, the local court rules fail to expressly provide for a party to request an oral hearing on a motion for summary judgment (or any motion for that matter). (App. F, *infra*, 25a-28a). After the service of Redland's motion for summary judgment, but outside the twenty-day period for filing a motion for summary judgment under the local rules, Clark filed a motion for leave to submit her own motion or summary judgment. Subsequently, Clark moved the trial court for an oral hearing on Redland's motion for summary

judgment despite the local rules' and court notice's direction to the contrary.

After several months passed without action by the district court on Clark's motion to permit her to file her motion for summary or her request for an oral hearing; and, while Redland's motion for summary judgment was still pending, Clark filed a witness' sworn declaration in opposition to Redland's motion for summary judgment, and moved the court to consider the declaration. Clark's filing of the witness' declaration was untimely under the local court rules of the Northern District of Georgia. (App. F, *infra*, 25a-27a).

On January 13, 2004, almost seven months after Redland filed its motion for summary judgment; five months after Clark filed her motion to permit the filing of her own motion for summary judgment; three months after Clark requested an oral hearing on Redland's motion; and, two months after Clark filed the witness' sworn declaration in opposition to Redland's motion ruled on all the parties' motions. (App. C, *infra*, 9a-15a).

In its order, the trial court denied Clark's motion for leave to file her own motion for summary judgment; denied Clark's request for an oral hearing on Redland's motion for summary judgment; denied Clark's motion to consider the witness' sworn declaration in opposition to Redland's motion for summary judgment; and, granted Redland's motion for summary judgment. (App. C, *infra*, 9a-15a).

Clark appealed the trial court's judgment and denial of her motions to the Eleventh Circuit. In an unpublished

opinion the Eleventh Circuit affirmed the trial court. (App. A, *infra*, 1a-6a).

The Eleventh Circuit failed to address the issues concerning proper summary judgment procedure raised by Clark. In a single footnote, based on the factually impossible premise that it had considered Clark's "Cross-Motion for Summary Judgment" (when in fact Clark had never been permitted to file a cross-motion for summary judgment), the Eleventh Circuit declined to address the important issues concerning summary judgment procedure raised in Clark's appeal. *Compare Clark v. Redland Insurance Co.*, No. 04-10604, slip op. at 6 n. 1(11th Cir. Aug. 18, 2004)(reproduced herein at App. A, *infra*, 1a-6a) *with* Brief of Appellant Dianna Clark at 2, *Clark v. Redland Ins. Co.*, No. 04-10604, (11th Cir. Aug. 18, 2004)(excerpt reproduced herein at App. G, *infra*, 28a).

The Eleventh Circuit apparently misunderstood Clark's argument that the Georgia district court failed to properly apply the conflict of laws rules of the transferor forum, New York, which resulted in the court's failure to apply the substantive insurance law of the transferor forum, New York. *Compare Clark v. Redland Insurance Co.*, No. 04-10604, slip op. at 4-6 (11th Cir. Aug. 18, 2004)(reproduced herein at App. A, *infra*, 1a-6a) *with* Brief of Appellant Dianna Clark at 31-34, *Clark v. Redland Ins. Co.*, No. 04-10604, (11th Cir. Aug. 18, 2004)(excerpt reproduced herein at App. G, *infra*, 29a-31a).

Following the Eleventh Circuit's opinion affirming the district court, Clark petitioned the circuit court for rehearing and rehearing en banc. The Eleventh Circuit

denied, without comment, Clark's petition. (App. B, *infra*, 7a).

REASONS FOR GRANTING THE PETITION

Matsushita Electric Industrial Co. v. Zenith Radio Corp, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) dramatically altered summary judgment practice in the federal trial courts. The nineteen years since the trilogy was handed down have seen a marked increase in federal trial courts disposing of cases through summary judgment. *See* Arthur R. Miller, *The Pretrial Rush To Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day In Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1048-1057 (2003). Accompanying this trend in summary judgment disposition of civil cases has been a corresponding decline in jury trials. The significant increase in case disposition through summary judgment and the alarming decrease in jury trials has given rise to the American Bar Association's the "Vanishing Jury Trial" project.[1]

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[1] Concern over the 'vanishing jury trial' in the American judicial process prompted the American Bar Association Section of Litigation to fund a major project to examine the phenomenon. An entire issue of the *Journal of Empirical Legal Studies*, vol. 1, issue 3 (Nov. 2004), with fourteen articles, is dedicated to the topic. Additionally, the 'vanishing jury trial' issue was a center piece topic at the recent 2004 Annual Meeting of the American Bar Association. *See* ABA, *Program Book, Annual Meeting – August 5-10, 2004 – Atlanta*, 117 (ABA 2004).

The increased utilization of summary judgment procedure as a means of disposing of cases, without the time and expense (the often perceived 'trouble') associated with jury trials, makes it critical that summary judgment procedure accords litigants the fullest opportunity to have their cases heard. Since litigants' actual 'day in court' is increasingly becoming a thing of the past, it is all the more imperative that summary judgment procedure affords litigants the broadest opportunity to be heard and have their evidence considered before a decision is rendered.

Unfortunately, as the present case illustrates, the current trend in federal trial courts seemingly seeks to 'streamline' summary judgment procedure to the point where the goal of case disposition outweighs the interests of the parties in a full and fairing hearing. More often than not, under current summary judgment practice, the "just, speedy and inexpensive determination of every action" envisioned by Federal Rule of Civil Procedure 1, has been driven by considerations of 'speedy' and 'inexpensive', with less regard for 'just'. This case provides the vehicle for the Court to put 'just' back in the lead in the federal trial courts' consideration of summary judgment motions.

1. A LOCAL COURT RULE PREVENTING A CLAIMANT FROM FILING A MOTION FOR SUMMARY JUDGMENT *AFTER* SERVICE OF AN ADVERSE PARTY'S MOTION FOR SUMMARY JUDGMENT VIOLATES FEDERAL RULE OF CIVIL PROCEDURE 56(a)'S MANDATE THAT A CLAIMANT MAY FILE A MOTION FOR SUMMARY JUDGMENT "AFTER SERVICE OF A MOTION FOR SUMMARY JUDGMENT BY THE ADVERSE PARTY".

Federal Rule of Civil Procedure 56, governs summary judgment procedure. Rule 56 (a), expressly provides a claimant, including a party seeking a declaratory judgment, the right to file a motion for summary judgment *after service* of an adverse party's motion for summary judgment:

> A party seeking ... to obtain a declaratory judgment may, at any time ... *after service of a motion for summary judgment by the adverse party*, move with or without supporting affidavits for a summary judgment in the party's favor.

Fed. R. Civ. P. 56(a)(emphasis supplied)

The United States District Court for the Northern District of Georgia has adopted a local court rule that, as applied in this case, denied Clark, a party seeking a declaratory judgment, her right under Rule 56(a) to file a motion for summary judgment *after service* of Redland's motion for summary judgment. Local Rule 56.1(C) of the Northern District of Georgia requires that, unless ordered otherwise by the court, *all* motions for summary judgment *shall* be filed not later than twenty days after the close of discovery:

> Motions for summary judgment shall be filed as soon as possible, but, unless otherwise ordered by the court, not later than twenty (20) days after the close of discovery, as established by the expiration of the original or extended discovery period or by written notice of all counsel, filed with the court, indicating that discovery was completed earlier.

N. Dist. Ga. Loc. R. 56.1(C) (emphasis added).

In this case, Redland filed its summary judgment motion on the last day permitted under the Local Rule 56.1(C). Redland served its motion on Clark by mail on the same day it filed its motion, thereby assuring Clark would not receive the motion until after the twenty-day period for filing motions for summary judgment had expired under the local court rule.

Given the dictate of Local Rule 56.1(C) and Redland's service by mail of its motion for summary judgment (on the last day of the twenty day period permitted under the local court rule for filing a motion for summary judgment), it was impossible for Clark to exercise her right under Federal Rule of Civil Procedure 56(a) to file a motion for summary judgment *after service* of Redland's motion.

While local court rules are permitted under Federal Rule of Civil Procedure 83, local rules cannot operate to deny litigants rights secured under the Federal Rules of Civil Procedure:

> District courts are not required to adopt local rules, but they *must not* circumvent the Federal Rules of Civil Procedure by implementing local rules or "procedures" which do not afford parties rights that they are accorded under the Federal Rules [of Civil Procedure].

Brown v. Crawford County, Ga., 960 F.2d 1002, 1008 –1009 (11th Cir. 1992)(emphasis in original). Consequently, "'[a] local rule cannot be applied if it is contrary to a federal statute or rule.'" *Id.* (quoting *Coady v. Aguadilla Terminal Inc.*, 456 F.2d 677, 678 (1st Cir. 1972) that cites *Hanna v. Plumer*, 380 U.S. 460 (1965)). When it comes to summary

judgment procedure, "[p]roper procedures must be followed". *Finn v. Gunter*, 722 F.2d 711, 713 (11th Cir. 1984).

This Court should provide needed clarification and direction to the trial bench, bar and public that local court rules and practices in derogation of the Federal Rules of Civil Procedure are invalid.

2. LOCAL COURT RULES OF A FEDERAL TRIAL COURT, WHICH DO NOT PROVIDE – AT A MINIMUM - FOR A PARTY TO REQUEST AN ORAL HEARING ON A MOTION FOR SUMMARY JUDGMENT, VIOLATE THE HEARING REQUIREMENT OF FEDERAL RULE OF CIVIL PROCEDURE 56(c) AND ARE IN DEROGATION OF FEDERAL RULE OF CIVIL PROCEDURE 78.

There is conflict and confusion among circuits as to the role of oral hearings in summary judgment procedure. This Court has not addressed this important issue.

The conflict exists as to whether local federal trial court rules must at a minimum afford a party the opportunity to request an oral hearing on a motion for summary judgment; *and*, if a party requests an oral hearing on a motion for summary judgment must an oral hearing be held. *Compare Dredge Corp. v. Penny*, 338 F.2d 456, 461-462 (9th Cir. 1964)(local trial court rules that preclude an oral hearing on summary judgment motion violate the Federal Rules of Civil Procedure) *with AD/SAT, A Division of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 226 (2nd Cir. 1999)(expressly rejecting the rule in *Dredge Corp.*)

The Federal Rules of Civil Procedure contemplate an oral hearing on a motion for summary judgment. Rule 56(c) provides that a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing"; and, that a party opposing a motion for summary judgment "prior to the day of hearing may serve opposing affidavits." Federal Rule of Civil Procedure 78, titled "Motion Day", clearly contemplates in its first paragraph that motions requiring notice and hearing (such as a motion for summary judgment) shall have an oral hearing:

> Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of ....

Fed. R. Civ. P. 78 (emphasis supplied).

The second paragraph of Rule 78 does not countermand the clear preference for an oral hearing on a motion for summary judgment:

> To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

Fed. R. Civ Proc. 78 (emphasis supplied).

Under the second paragraph of Rule 78, a district court can *only* determine a motion without oral hearing "[t]o expedite its business." *Id.*

In this case, the District Court for the Northern District of Georgia's local rules and standing notice, issued upon the filing of a motion for summary judgment, do not provide for a party to request an oral hearing on a motion for summary judgment (or any other motion). Local Rule 7.1(E) of the Northern District of Georgia, governing hearings on motions, does not expressly allow for a party to request an oral hearing on a motion:

> E. Hearings. Motions will be decided by the court without oral hearing, unless a hearing is ordered by the court.[2]

Local Rule 56.1 of the Northern District of Georgia, dealing with motions for summary judgment, likewise contains no provision for a party to request an oral hearing on a motion for summary judgment. *See* N.D. Ga. Local R. 56.1 (reproduced at App F, *infra*, 25a-27a).

The standard notice issued by the clerk of court of the Northern District of Georgia, upon the filing of a motion for summary judgment (and issued in this case upon Redland's

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[2] Compare Northern District of Georgia Local Rule 7.1(E) with the local rule of the Southern District of Georgia, which permits a party to request an oral hearing on motions:

> LR 7.2 Hearings. Motions shall generally be determined upon the motion and supporting documents filed as prescribed herein. However, the assigned Judge may allow oral argument sua sponte, or upon written request of either party. Requests for oral argument shall estimate the time required for argument. (emphasis supplied).

filing of its summary judgment motion), contains no provision for a party to request an oral hearing: "Unless otherwise stated by the trial court, the Court will take said motion for summary judgment under advisement immediately upon the close of the aforesaid 20 day period [for responding to a motion for summary judgment]." Notice to Respond to S.J. Mot., *Clark v. Redland Ins. Co.*, Civ. Action No. 1:02-cv-3514-GET (N.D. Ga. Jun. 20, 2003)(reproduced at App. D, *infra*, 16a-17a).

Since the *only* basis permitted under the second paragraph of Federal Rule of Civil Procedure 78 for a trial court to decide a motion for summary judgment without an oral hearing is "[t]o expedite [the court's] business", the relevant inquiry is the following: Does a local rule that provides that motions will be decided without oral hearing in fact expedite the court's business?

There is a tendency to accept without much reflection or substantiation that local rules like the Northern District of Georgia's somehow 'expedite' the court's business. To the contrary, however, is empirical evidence from the Federal Judicial Center's study, *Judicial Controls and The Civil Litigation Process: Motions*, which demonstrates that motion days, with oral argument, result in more expeditious and efficient disposition of motions than does the practice of considering motions on written submissions only, with oral hearings held on an *ad hoc* basis. *See* Edward J. Devitt, *Effective Judicial Management of Motion Practice*, 91 F.R.D. 153 (1981)(discussing Paul R. J. Connolly & Patricia A

Lombard, *Judicial Controls and The Civil Litigation Process: Motions* (Federal Judicial Center 1980).[3]

In the Federal Judicial Center's study, the ruling time on a motion, from filing to the time a written opinion was issued, was substantially more drawn out - taking from one to five months – in cases without an oral hearing, than when oral hearings and rulings from the bench took place. *Id.* at 157(discussing Connolly & Patricia, *Judicial Controls and The Civil Litigation Process: Motions*). Interestingly, in this case where no oral hearing was held on Redland's motion for summary judgment, the time from filing of the motion on June 19, 2003 until the time the district court's ruling was issued on January 13, 2004 was a period of almost seven months.

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[3] Congress established the Federal Judicial Center as a body "within the judicial branch of the Government", 28 U.S.C. § 620(a), which studies improvements in judicial administration. *Mistretta v. U.S.*, 488 U.S. 361, 389 n. 15 (1989). This Court has often relied on the Federal Judicial Center's reports, studies and publications. *E.g. Atkins v. Virginia*, 536 U.S. 304, 327 (2002) (relying on the Federal Judicial Center's *Reference Manual on Scientific Evidence* and its *Manual for Complex Litigation*); *Hiersche v. U.S.*, 503 U.S. 923, 925 n. 5 (1992) (relying on the Federal Judicial Center's *Unresolved Intercircuit Conflict: The Nature and Scope of the Problem, Final Report: Phase I*); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 623 (1991) (relying on the Federal Judicial Center s *Jury Selection Procedures in United States District Courts*)

Since summary judgment procedure has become a leading means of case disposition in federal trial courts, to a large degree replacing jury trials, parties should be afforded the broadest opportunity to be heard on summary judgment motions, to include an oral hearing. For the benefit of the bench, bar, and public, this Court is urged to resolve the conflict and confusion in the lower courts and adopt a preference for oral hearings on motions for summary judgment. *See Dredge Corp.* 338 F.2d at 461-462.

3. THE EXCUSABLE NEGLECT STANDARD AND ANALYSIS OF *PIONEER INVESTMENT SERVICES CO. V. BRUNSWICK ASSOCIATES LTD.*, 507 U.S. 380 (1993) APPLIES TO FEDERAL RULES OF CIVIL PROCEDURE; PARTICULARLY, IN THE CONTEXT OF THE TIMELINESS OF AN AFFIDAVIT, OR SWORN DECLARATION, SUBMITTED IN RESPONSE TO AN ADVERSE PARTY'S MOTION FOR SUMMARY JUDGMENT.

In the trial court, Clark submitted the sworn declaration of a witness in opposition to Redland's motion for summary judgment. Clark, however submitted the witness' sworn declaration to the trial court beyond the time period for filing responsive material allowed under local court rules and the trial court's standing notice pertaining to motions for summary judgment. *See* N.D. Ga. Local R. 7.1(B) (reproduced at App. F, *infra*, at 25a); Notice to Respond to S.J. Mot., *Clark v. Redland Ins. Co.*, Civ. Action No. 1:02-cv-3514-GET (N.D. Ga. Jun. 20, 2003)(reproduced at App. D, *infra*, 16a-17a).

After Clark submitted the witness' sworn declaration to the trial court, almost two months passed before the court decided Redland's motion for summary judgment. At the same time the trial court granted Redland's motion for summary judgment, it denied, without discussion, Clark's motion to consider the witness' sworn declaration submitted in opposition to Redland's summary judgment motion.[4]

In *Pioneer Investment Services Co. v. Brunswick Associates Ltd*, 507 U.S. 380 (1993), this Court articulated an

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[4] The Eleventh Circuit, in its footnote disposition of all the procedural issues raised by Clark's appeal, simply stated:

> We conclude that the contract alone supports the district court's conclusion and its entry of summary judgment. In coming to this conclusion, we have also considered Clark's Cross-Motion for Summary Judgment and the supporting Declaration of Dan Bucklew, both of which Clark untimely filed -- over a month late -- contrary to N.D. Ga. L.R. 56.1(C)'s requirements. Not only can we find no error in the district court's application of its Local Rules, but we also note that the Declaration itself does not change the unambiguous nature of the relevant policy language.

Clark v. Redland Insurance Co., No. 04-10604, slip op. at 6 n. 1(11th Cir. Aug. 18, 2004)(reproduced herein at App. A, *infra*, 1a-6a). Again, since Clark never filed a motion for summary judgment (she had only moved for permission to file a motion) the opinion contains the erroneous factual premise that Clark had submitted a cross-motion for summary judgment. *Contra id.*

excusable neglect standard and analysis applicable to the failure of a party to timely act under the Federal Rules of Bankruptcy Procedure. This Court has not yet addressed the important issue of whether the excusable neglect standard and analysis in *Pioneer* applies to a party's failure to timely act under the Federal Rule of Civil Procedure; particularly, in the context of the timeliness of the submission of an affidavit, or sworn declaration, in response to an adverse party's motion for summary judgment. This issue has added importance to proper summary judgment procedure since Federal Rule of Civil Procedure 56(c) provides that in responding to a motion for summary judgment: "The adverse party prior to the day of hearing may serve opposing affidavits."

4. IN A DIVERSITY JURISDICTION CASE TRANSFERRED UNDER UNITED STATES CODE, TITLE 28, SECTION 1404(a) FROM A DISTRICT COURT IN ONE STATE TO A DISTRICT COURT IN ANOTHER STATE, THE TRANSFEREE COURT IS OBLIGATED TO PROPERLY APPLY THE CONFLICT OF LAWS RULES OF THE TRANSFEROR FORUM.

The Eleventh Circuit has strayed from the rule that "[A transferee forum] is required to apply the law of the transferor court, regardless of who initiates the transfer. A transfer under § 1404(a), in other words, does not change the law applicable to a diversity case." *Ferens v. John Deere Company*, 494 U.S. 516, 523 (1990); *see also Van Dusen v. Barrack*, 376 U.S. 612 (1964).

In its opinion in Clark's case, the Eleventh Circuit skipped over first base and went straight to second base in its

analysis of the law applicable to this case transferred from the Southern District of New York to the Northern District of Georgia under United States Code, title 28, section 1404(a).

Under the conflict of laws rules of the transferor forum, New York, if there is no substantive difference between New York's law and the other state's law (here Georgia) "a New York court will dispense with the choice of law analysis" and apply New York law. *International Business Machines Corp. v. Liberty Mutual Insurance. Co.*, 363 F.3d 137, 143-144 (2nd Cir. 2004)(an insurance coverage dispute). In the present case there is no difference in the applicable substantive law of the transferor forum, New York, and the transferee forum, Georgia.

Clark's case involves the interpretation of a motor vehicle liability insurance policy in the context of a motor vehicle accident victim's third party bodily injury claim. In this context, both New York and Georgia have the same substantive rules of insurance law.

Both New York and Georgia law require compulsory motor vehicle insurance. *Planet Insurance Co. v. Bright Bay Classic Vehicles, Inc.*, 75 N.Y.2d 394, 395, 553 N.E.2d 562, 563 (N.Y. 1990); *Anderson v. Southeastern Fidelity Insurance Co.*, 251 Ga. 556, 557, 307 S.E.2d 499, 500 (Ga. 1983). When interpreting motor vehicle insurance contracts, both New York and Georgia share the same strong public policy that victims of motor vehicle accidents have recourse to insurance for the recovery of their damages. *Planet Ins. Co.*, 75 N.Y.2d 394 at 401, 553 N.E.2d 562 at 565; *Anderson*, 251 Ga. at 557, 307 S.E.2d at 500. Also, when interpreting motor vehicle insurance contracts, both New York and Georgia adhere to the rule of construction that

ambiguities in the insurance contract are to be construed against the insurance company, as the drafter of the contract, and in favor person seeking coverage. *Greaves v. Public Service Mutual Insurance Co.*, 5 N.Y.2d 120, 125, 155 N.E.2d 390, 392 (N.Y. 1959)("We will keep in mind that this policy was written by the insurer and any ambiguity is to be resolved against it."); *Anderson*, 251 Ga. at 557, 307 S.E.2d at 500 (Georgia law).

New York's highest court has applied the insurance law principles and public policy New York shares with Georgia to facts on four –squares with the facts of Clark's case. *See Planet Ins. Co.*, 75 N.Y.2d at 397-399, 553 N.E.2d at 562-563. The Georgia appellate courts have yet to encounter the factual scenario. In *Planet Ins.*, under nearly identical facts as to those in Clark's case, and involving an almost identical insurance policy as Redland's policy, the New York court held that an innocent injured third party, like Clark, was entitled to the insurance policy's proceeds. *Id.* In Clark's the Eleventh Circuit, in affirming the district court, reached the complete opposite result than that reached in *Planet Ins. Compare id. with Clark v. Redland Insurance Co.*, No. 04-10604, slip op. at 4-6 (11th Cir. Aug. 18, 2004)(reproduced herein at App. A, *infra*, 1a-6a).

Since both New York and Georgia share the same substantive rules and public policies in concerning motor vehicle insurance contract interpretation; there is no conflict between the applicable rules of law of the two states. When the applicable substantive law of both New York and the sister state are the same, the New York conflict of law rule dictates that a "center of gravity" choice of law analysis *does not* apply, and case is governed by New York substantive law (as the law of the forum). *See International Business*

Machines Corp., 363 F.3d at 143-144. In summary, under New York law if there is no conflict in the applicable rules of substantive law of the competing states, then there is no 'conflict of law' that necessitates a 'choice of law'. *Id.*

When the Eleventh Circuit skipped to the application of New York's "center of gravity" choice of law analysis in Clark's case, it completely missed the critical first base of determining if there was the 'conflict of laws' between New York and Georgia that must exist before engaging in a choice of law analysis. *See id.*

Since both New York and Georgia share the same substantive rules and public policies in concerning motor vehicle insurance contract interpretation; there is no conflict between the applicable rules of law of the two states, and under New York's conflict of laws rule, New York's law applies to Clark's case. Since the Southern District of New York was original forum of filing in this case, the law of New York, including *Planet Ins.*, should have been applied by the transferee court in Georgia. *See Ferens*, 494 U.S. at 523; *see also Van Dusen*, 376 U.S. 612.

In Clark's case, the Eleventh Circuit substantially departed from this Court's precedent in *Ferens* and *Van Dusen*, by failing to properly apply the law of the transferor forum, New York. This Court must right the course in this important area of law.

CONCLUSION

Since this case presents important issues of proper summary judgment procedure in the federal trial courts, and for the additional reasons set forth above, this Court should grant Clark's petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted.

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January 2005

APPENDIX A

FILED [DO NOT PUBLISH]
U.S. COURT OF APPEALS ELEVENTH CIRCUIT
AUG. 18, 2004
THOMAS K. KHAN, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-10604
Non-Argument Calendar
D. C. Docket No. 02-03514-CV-GET-1

DIANNA CLARK,

Plaintiff-Appellant,

versus

REDLAND INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(August 18, 2004)

Before ANDERSON, MARCUS, and WILSON, Circuit Judges.

PER CURIAM:

Dianna Clark appeals the district court's order granting summary judgment in favor of Redland Insurance Company

("Redland"). Clark argues that, after this case was transferred from the District Court for the Southern District of New York to the District Court for the Northern District of Georgia, the latter court erred, after applying New York choice-of-law provisions, by applying Georgia substantive law to interpret Redland's insurance contract with a non-party, Lleze Thrag Industries ("LTI"). Pursuant to Georgia law, the district court found that Clark was not entitled to the declaratory judgment that she sought because Redland' s policy with LTI unambiguously did not cover Clark's damages.

We review the district court's order granting summary judgment de novo. See Madray v. Publix Supermarkets, Inc., 208 F.3d 1290, 1296 (11th Cir. 2000). Likewise, "[t]he interpretation of an insurance contract is a question of law subject to de novo review." Galindo v. ARI Mut. Ins. Co., 203 F.3d 771, 774 (11th Cir. 2000).

Upon thorough review of the record, as well as careful consideration of the parties' briefs, we find no reversible error and affirm.

The relevant facts are straightforward. Clark filed this action against Redland for a declaratory judgment that Redland is indebted to her under an automobile liability insurance policy issued to one of Redland's insureds, non-party LTI. Clark alleged that Redland owed her for damages arising out of an automobile accident during which her car was struck by a 1997 Isuzu Rodeo, driven by Tayo Reed. Reed, who leased the Rodeo from LTI, did not have automobile insurance coverage for the Rodeo or the accident. Clark previously recovered a default judgment against LTI for $771,600.00 in Fulton County (Georgia) Court. When the default judgment was entered, however,

LTI had gone out of business. Redland was not a party to the Fulton County Court action.

Redland had issued to LTI a Business Automobile Policy which provides coverage for "all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which the insurance applies, caused by an 'accident' and resulting from the ownership, maintenance, or use of a 'covered auto.'" The policy defines a "covered auto" as "only 'rental autos' used in your business of short term auto rental to others (for a period of less than twelve (12) months)." The policy further provides that a "rental auto" is an "auto held by you for rental to others on a short term basis (less than twelve (12) months), or used in connection with your business of renting autos to others, or used for other than rental uses by you, or any of your employees with your permission."

In this action, Clark sought a declaratory judgment that, pursuant to the Business Automobile Policy, Redland was indebted to her for the state court judgment entered against LTI. Clark originally filed her complaint in the United States District Court for the Southern District of New York. That court transferred the case to the District Court for the Northern District of Georgia, pursuant to 28 U.S.C. § 1404(a), after finding that "[t]he operative events occurred in Georgia and Georgia law applies."

After noting that New York's choice-of-law provisions required application of Georgia's substantive law to interpret the insurance policy, the district court found, pursuant to Georgia contract law, that the Business Automobile Policy did not cover the 1997 Rodeo because Reed had leased the automobile for 24 months. Since the

Business Automobile Policy clearly stated that it covered only cars leased for "less than twelve (12) months," the district court held that Clark could not recover against Redland for the default judgment she had secured against LTI and Redland was entitled to summary judgment. T his appeal followed.

Clark argues that because she originally filed this action in federal court in New York, New York contract law controls the interpretation of the Business Automobile Policy. "When a case is transferred form one forum to another, the transferor court's choice-of-law rules apply to the transferred case even after the transfer occurs." Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 135 F.3d 750, 752 (11th Cir. 1998). In contract cases, New York applies the "center of gravity" test to resolve choice-of-law issues. This test analyzes "the place of contracting, negotiation and performance; the location of the subject matter of the contract; and the domicile of the contracting parties." See In re Allstate Ins. Co. and Stolarz, 81 N.Y.2d 219, 227, 597 N.Y.S.2d 904, 613 N.E.2d 936 (1993).

The District Court for the Southern District of New York, prior to transferring the case, noted the following: "The operative events occurred in Georgia and Georgia law applies. Considerations of convenience clearly favor the transfer of the case to the district court in that state. There are no substantial contacts of the litigation in New York." On appeal, Clark does not dispute this observation and has called to our attention no New York contact, and certainly not a substantial one. After transfer, the District Court for the Northern District of Georgia applied New York's "center of gravity" test, as Boardman Petroleum instructs, and concluded that Georgia law applied to the interpretation of

the Business Automobile Policy. Clark is mistaken that Boardman Petroleum mandates application of the substantive law of the transferor state. Rather, in that case, we held only that the transferor state's choice-of-law provisions control. See 135 F.3d at 752; see also American Family Life Assur. Co. of Columbus, Ga. v. U.S. Fire Co., 885 F.2d 826, 832 (11th Cir. 1989) (in suit originally filed in Missouri and transferred to Georgia, Missouri's choice-of-law rules determined the applicable substantive law).

Here, New York's "center of gravity" test mandates that Georgia law applies to interpret the Business Automobile Policy as it applies to the Rodeo. As the New York district court observed, neither the insurance policy nor the accident has any relationship to New York, as impliedly conceded by Clark on appeal. We can find no error in the district court's choice-of-law decision and its accompanying application of Georgia contract law to resolve this dispute. While Clark urges this court to consider competing public policy – "that innocent persons who are injured should have an adequate recourse for the recovery of their damages," Anderson v. Southeastern Fid. Ins. Co., 307 S.E. 2d 499, 500 (Ga. 1983) -- we simply are not at liberty to rewrite the unambiguous terms of an insurance policy. Indeed, as the Georgia Court of Appeals recently observed: "Courts have no more right by strained construction to make an insurance policy more beneficial by extending the coverage contracted for than they would have to increase the amount of coverage." Capitol Indem., Inc. v. Brown, 581 S.E. 2d 339, 342 (Ga. Ct. App. 2003).[1]

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[1] We conclude that the contract alone supports the district court's conclusion and its entry of summary judgment. In coming to this conclusion, we have also

Pursuant to the terms of the Business Automobile Policy, Clark may not recover declaratory relief against Redland. Accordingly, we affirm.

AFFIRMED.

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considered Clark's Cross-Motion for Summary Judgment and the supporting Declaration of Dan Bucklew, both of which Clark untimely filed -- over a month late -- contrary to N.D. Ga. L.R. 56.1(C)'s requirements. Not only can we find no error in the district court's application of its Local Rules, but we also note that the Declaration itself does not change the unambiguous nature of the relevant policy language.

APPENDIX B

FILED
U.S.COURT OF APPEALS
ELEVENTH CIRCUIT
OCT. 25, 2004
THOMAS K. KAHAN, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-10604-AA

DIANNA CLARK,

Plaintiff-Appellant,

versus

REDLAND INSURANCE COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, _____F.2d_____) .

Before: ANDERSON, MARCUS and WILSON, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
s/Stanley Marcus
UNITED STATES CIRCUIT JUDGE

ORD-42

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DIANNA CLARK,
Plaintiff,

v. CIVIL ACTION
NO. 1:02-cv-3514-GET

REDLAND INSURANCE COMPANY,
Defendant.

ORDER

The above-styled matter is presently before the court on:

1) defendant's motion for summary judgment [docket no. 19];

2) plaintiff's motion for leave to file motion for summary judgment out of time [docket no. 24];

3) plaintiff's motion for hearing on defendant's motion for summary judgment [docket no. 27];

4) plaintiff's motion for leave to file declaration of Dan Buckalew in opposition to defendant's motion for summary judgment [docket no. 28].

On May 14, 2002, plaintiff filed the instant action in the United States District Court for the Southern District of New York, seeking a declaratory judgment that defendant is indebted to her under an automobile liability insurance policy issued to non-party Lleze Thrag Industries ("LTI"). On December 19, 2002, the New

York court transferred the case to this court pursuant to 28 U.S.C. § 1404(a).

On June 19, 2003, defendant filed a motion for summary judgment. On August 14, 2003, plaintiff filed a motion for leave to file a motion for summary judgment out of time. On October 17, 2003, plaintiff filed a motion for hearing on defendant's motion for summary judgment. On November 5, 2003, plaintiff filed a motion for leave to file a declaration of Dan Buckalew in opposition to defendant's motion for summary judgment. All pending motions are now ripe for consideration.

Plaintiff's motion for leave to file summary judgment

Discovery in this action concluded on May 30, 2003. On August 14, 2003, plaintiff filed a motion for leave to file its own motion for summary judgment. Upon review of plaintiff's motion and defendant's response, plaintiff's motion for leave to file motion for summary judgment out of time [docket no. 24] is DENIED.

Plaintiff's motion for leave to file declaration

On November 3, 2003, plaintiff filed a motion for leave to file a declaration of Dan Buckalew in opposition to defendant's motion for summary judgment. Upon review of plaintiff's motion and defendant's response, plaintiff's motion for leave to file declaration of Dan Buckalew in opposition to defendant's motion for summary judgment [docket no. 28] is DENIED.

Motion for Hearing

On October 17, 2003, plaintiff filed a motion for hearing on defendant's motion for summary judgment.

Upon review of the parties' submissions, the court can rule on defendant's motion for summary judgment based on the written record. Accordingly, plaintiff's motion for hearing on defendant's motion for summary judgment [docket no. 27] is DENIED.

Defendant's Motion for Summary Judgment

Standard

Courts should grant summary judgment when "there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must "always bear the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). That burden is "discharged by 'showing' - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case." Id. at 325; see also U.S. v. Four Parcels of Real Property, 941 F.2d 1428, 1437 (11th Cir. 1991).

Once the movant has met this burden, the opposing party must then present evidence establishing that there is a genuine issue of material fact. Celotex, 477 U.S. at 325. The nonmoving party must go beyond the pleadings and submit evidence such as affidavits, depositions and admissions that are sufficient to demonstrate that if allowed to proceed to trial, a jury might return a verdict in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). If he does so, there is a genuine issue of fact that requires a trial. In making a determination of whether there is a material issue of fact, the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor. Id. at 255; Rollins v. TechSouth, Inc., 833 F.2d 1525, 1529 (11th Cir. 1987). However, an issue is not genuine if it is unsupported by evidence or if it is created by evidence that is "merely colorable" or is "not significantly probative." Anderson, 477 U.S. at 249-50. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case. Id. at 248. Thus, to create a genuine issue of material fact for trial, the party opposing the summary judgment must come forward with specific evidence of every element essential to his case with respect to which (1) he has the burden of proof, and (2) the summary judgment movant has made a plausible showing of the absence of evidence of the necessary element. Celotex, 477 U.S. at 323.

Facts

In light of the foregoing standard, the court finds the following facts for the purpose of resolving defendant's motion for summary judgment only.

On September 26, 1997, plaintiff suffered injuries when a car driven by Tayo Reed hit plaintiff's automobile on Piedmont Road in Atlanta. Reed was driving a 1997 Isuzu Rodeo leased from LTI. At the time of the accident, Reed had no automobile insurance coverage for the Rodeo or the accident.

On September 17, 1999, plaintiff filed suit against Reed and LTI in the State Court of Fulton County, Georgia, to recover for her injuries in the car accident. Subsequently, plaintiff dismissed Reed from the suit. On June 29, 2000, the state court awarded plaintiff a default judgment against LTI for $771,600.00. At the time of the default judgment, LTI was no longer in business.

Defendant issued a Business Automobile Policy # II00000221 to LTI. The policy states that it "will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which the insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a 'covered auto'". The policy defines a "covered auto" as "only 'rental autos' used in your business of short term auto rental to others (for a period of less than twelve (12) months)." The policy defines "rental auto" as an "auto held by you for rental to others on a short term basis (less than twelve (12) months), or used in connection with your business of renting autos to others, or used for other than rental purposes by you, or any of your employees with your permission."

Discussion

Defendant argues that the court does not have subject matter jurisdiction over this declaratory judgment action because defendant already has denied coverage under the policy. The Declaratory Judgment Act, 28 U.S.C. § 2201(a), "confer[s] on federal courts unique and substantial discretion in deciding whether to declare the rights of the litigants." Wilton v. SevenFalls Co., 515 U.S. 277, 286-

87 (1995). "Regardless of the scope of the court's discretion to entertain a claim for declaratory relief under 28 U.S.C. § 2201, if there is no 'case or controversy,' the court has no jurisdiction over the subject matter of a claim." Tilley Lamp Co. v. Thacker, 454 F.2d 805, 807 (5th Cir. 1972). Here, plaintiff is seeking a declaratory judgment that defendant is indebted to plaintiff for a state court judgment entered against LTI, under an insurance policy issued by defendant to LTI. An actual controversy exists and the court is authorized to assert jurisdiction over the case.

The parties disagree over what law governs the dispute. "When a case is transferred from one forum to another, the transferor court's choice-of-Law rules apply to the transferred case even after the transfer occurs." Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 135 F.3d 750, 752 (11th Cir. 1998). See also § 1404(a). Pursuant to New York law, the choice of law applicable to an insurance policy is governed by the "center of gravity" test, which looks to such factors as "the place of contracting, negotiation and performance; the location of the subject matter of the contract; and domicile of the contracting parties." Allstate Ins. Co. v. Conigliaro, 670 N.Y.S. 2d 469, 470 (N.Y. App. Div. 1st Dept. 1998). In its December 20, 2002 order, the transferring court. stated that "The operative events occurred in Georgia and Georgia law applies." Therefore, as articulated by the New York court, under New York choice-of-law rules, Georgia law applies to the instant action.

Under Georgia law, "construction of an insurance policy is governed by the ordinary rules of contract construction, and when the terms of a written contract are

clear and unambiguous, the court is to look to the contract alone to find the parties' intent." Nationwide Mut. Fire Ins. Co v. Somers, 2003 WL 22846099, *4 (Ga. App. 2003). The terms of the policy provisions at issue are clear and unambiguous. The policy provides coverage for rental autos that are rented "to others on a short term basis (less than twelve (12) months)". Here, the record indicates that Ms. Reed entered into a lease for the Isuzu Rodeo for a period of 24 months. Accordingly, there is no dispute of fact that pursuant to the terms of the policies, the Rodeo was not a covered vehicle. As such, defendant's motion for summary judgment [docket no. 19] is GRANTED.

Summary

1) Defendant's motion for summary judgment [docket no. 19] is **GRANTED;**

2) plaintiff's motion for leave to file motion for summary judgment out of time [docket no. 24] is **DENIED;**

3) plaintiff's motion for hearing on defendant's motion for summary judgment [docket no. 27] is **DENIED;**

4) plaintiff's motion for leave to file declaration of Dan Buckalew in opposition to defendant's motion for summary judgment [docket no. 28] is **DENIED.**

SO ORDERED, this 13 day of January, 2004.

s/ G. ERNEST TIDWELL, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

NOTICE

To: David E. Tuszynski, Esq.
Garland Samuel & Loeb
3151 Maple Drive, N.E.
Atlanta, GA 30305-2500

June 20, 2003

UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Dianna Clark,

Plaintiff CIVIL ACTION

Redland Insurance Company, No. 1:2-cv-3514-GET

Defendant

NOTICE TO RESPOND TO SUMMARY JUDGMENT MOTION

On 6/19/03, Redland Insurance Company, filed a motion for summary judgment in this Court, case document number 19.

Pursuant to this Court's order dated April 14, 1987, opposing counsel is hereby notified that within 20 days from the date said motion was served, filing of all materials,

including any affidavits, depositions, answers to interrogatories, admissions on file and any other relevant materials to be considered in opposition to the motion for summary judgment, is required. Federal Rules of Civil Procedure 56(c); Moore v. State of Florida, 703 F.2d 516, 519 (11th Cir 1983)

Unless otherwise stated by the trial court, the Court will take said motion for summary judgment under advisement immediately upon the close of the aforesaid 20 day period. Id. at 519. See also Donaldson v. Clark, 786 F.2d 1570, 1575 (11th Cir. 1986); Griffith v. Wainwright, 772 F.2d 822, 825 (11th Cir. 1985).

The entry of a summary judgment by the trial court is a final judgment on the claim or claims decided. Finn v. Gunter, 722 F.2d 711, 713 (11th Cir 1984). Whenever the non-moving party bears the burden of proof at trial on a dispositive issue and the party moving for summary judgment has demonstrated the absence of any genuine issue of fact, the nonmoving party must go beyond the pleadings and must designate, by affidavit or other materials, "... specific facts showing that there is a genuine issue for trial." Federal Rules of Civil Procedure 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 324; 106 S.Ct. 2548, 2552-53; 91 L.Ed.2d 265, 272-3.

Luther D. Thomas, Clerk
United States District Court
Northern District of Georgia

Copies to counsel of record

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DIANNA CLARK,

Plaintiff,

- against - 02 Civ. 3660 (LMM)

REDLAND INSURANCE CO.

Defendant.

MEMORANDUM AND ORDER

McKENNA, D.J.

In this case, plaintiff, a resident of Georgia, seeks, in substance, to enforce, under Georgia law, a judgment obtained in Georgia against an insurance policy issued by defendant.

Defendant moves for a transfer of this action to the United States District Court for the Northern District of Georgia, or, in the alternative, for judgment on the pleadings.

The operative events occurred in Georgia and Georgia law applies. Considerations of convenience clearly favor the transfer of the case to a district court in that state. There are no substantial contacts of the litigation with New York.

The Clerk is directed to transfer this case, pursuant to 28 U.S.C. § 1404(a), to the United States District Court for the Northern District of Georgia.

SO ORDERED.

Dated: December 19, 2002

s/ Lawrence M. McKenna
U.S.D. J.

COPIES MAILED TO COUNSEL: DEC. 19, 2002

APPENDIX F

Constitutional, Statutory and Regulatory Provisions Involved

1. 28 U.S.C. § 1404. Change of venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) As used in this section, the term "district court" includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term "district" includes the territorial jurisdiction of each such court.

2. Federal Rules of Civil Procedure

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary,

the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that

the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 78. Motion Day

Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as the judge considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

3. Local Court Rules for the United States District Court for the Northern District of Georgia Civil Local Rules

LR 7.1. FILING OF MOTIONS AND RESPONSES; HEARINGS

A. Filing of Motions.

(1) Every motion presented to the clerk for filing shall be accompanied by a memorandum of law which cites supporting authority. If allegations of fact are relied upon, supporting affidavits must be attached to the memorandum of law.

(2) Specific filing times for some motions are set forth below. All other motions must be filed WITHIN THIRTY (30) DAYS after the beginning of discovery unless the filing party has obtained prior permission of the court to file later.

B. Response to Motion. Any party opposing a motion shall serve the party's response, responsive memorandum, affidavits, and any other responsive material not later than ten (10) days after service of the motion, except that in cases of motion for summary judgment the time shall be twenty (20) days after the service of the motion. Failure to file a response shall indicate that there is no opposition to the motion.

C. Reply. A reply by the movant shall be permitted, but it is not necessary for the movant to file a reply as a

routine practice. When the movant deems it necessary to file a reply brief, the reply must be served not later than ten (10) days after service of the responsive pleading.

D. Page and Type Limitations. Absent prior permission of the court, briefs filed in support of a motion or in response to a motion are limited in length to twenty-five (25) pages. If the movant files a reply, the reply brief may not exceed fifteen (15) pages. Refer to LR 5.1 for restrictions regarding the preparation of briefs. At the end of the brief, counsel must certify that the brief has been prepared with one of the font and point selections approved by the court in LR 5.1B or, if type written, that the brief does not contain more than 10 characters per inch of type.

E. Hearings. Motions will be decided by the court without oral hearing, unless a hearing is ordered by the court.

F. Effect of Noncompliance. The court, in its discretion, may decline to consider any motion or brief that fails to conform to the requirements of these rules.

LR 56.1. MOTIONS FOR SUMMARY JUDGMENT

A. Generally. Motions for summary judgment shall be filed in accordance with the provisions of Fed.R.Civ.P. 56, except that no date for a hearing shall be set until after the party opposing the motion has had twenty (20) days after service of the motion in which to file a responsive pleading. In accordance with LR 7.1C, the parties shall not be permitted to file supplemental briefs and materials, with the

exception of a reply by the movant, except upon order of the court.

B. Form of Motion.

(1) The movant for summary judgment shall attach to the motion a separate and concise statement of the material facts to which the movant contends there is no genuine issue to be tried. Each material fact shall be numbered separately. Statements in the form of issues or legal conclusions (rather than material facts) will not be considered by the court. Affidavits and the introductory portions of briefs do not constitute a statement of material facts.

(2) The respondent to a motion for summary judgment shall attach to the response a separate and concise statement of material facts, numbered separately, to which the respondent contends there exists a genuine issue to be tried. Response should be made to each of the movant's numbered material facts. All material facts contained in the moving party's statement which are not specifically controverted by the respondent in respondent's statement shall be deemed to have been admitted. The response that a party has insufficient knowledge to admit or deny is not an acceptable response unless the party has complied with the provisions of Fed.R.Civ.P. 56(f).

(3) All documents and other record materials relied upon by a party moving for or opposing a motion for summary judgment shall be clearly identified for the court. Where appropriate, dates and specific page numbers shall be given.

C. Time. Motions for summary judgment shall be filed as soon as possible, but, unless otherwise ordered by the court, not later than twenty (20) days after the close of discovery, as established by the expiration of the original or extended discovery period or by written notice of all counsel, filed with the court, indicating that discovery was completed earlier.

APPENDIX G

[EXCERPTS FORM BRIEF OF APPELLANT DIANNA CLARK
IN THE UNITED SATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT]

[Page 2]
Docket No. 04-10604-A
Dianna Clark v. Redland Insurance Company

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT ERRED IN NOT ALLOWING CLARK TO FILE A MOTION FOR SUMMARY JUDGMENT, AS PROVIDED BY FED. R. CIV. P. 56(a), ***AFTER*** REDLAND FILED ITS MOTION FOR SUMMARY JUDGMENT?

II. WHETHER THE DISTRICT COURT ERRED IN DENYING CLARK AN ORAL HEARING ON REDLAND'S MOTION FOR SUMMARY JUDGMENT?

III. WHETHER THE DISTRICT COURT ERRED IN FAILING TO CONSIDER THE DECLARATION OF DAN BUCKALEW IN OPPOSITION TO REDLAND'S MOTION FOR SUMMARY JUDGMENT?

IV. WHETHER THE DISTRICT COURT ERRED IN GRANTING REDLAND'S MOTION FOR SUMMARY JUDGMENT?

[Pages 31-34]

a. New York Law Applies To this Diversity Action

Clark filed this action seeking declaratory judgment in the United States District Court for the Southern District of New York. The case was transferred to the United States District Court for the Northern District of Georgia pursuant to 28 U.S.C. § 1404(a). "[A transferee forum (here Georgia)] is required to apply the law of the transferor court [here New York], regardless of who initiates the transfer. A transfer under § 1404(a), in other words, does not change the law applicable to a diversity case." *Ferens v. John Deere Company*, 494 U.S. 516, 523 (1990); *see also*, *Van Dusen v. Barrack*, 376 U.S. 612 (1964). Also, in a diversity action the district court is obligated to apply the substantive law of the forum state. *LaFarge Corp. v. Travelers Ind. Co.*, 118 F3d 1511, 1515 (11th Cir. 1997). "This extends to the forum state's conflicts of law rules." *Id.* New York was the initial forum in this case. The case is in the Georgia district court only by virtue of the transfer pursuant to 28 U.S.C. § 1404(a). Consequently, New York law applies in this transferred diversity action. *See Ferens*, 494 U.S. 516; *Van Dusan*, 376 U.S. 612; *see also*, *LaFarge Corp.*, 118 F3d 1511.

The applicable New York law in this diversity action, includes New York's conflicts of law rules. *LaFarge Corp.*, 118 F3d at 1515; *International Business Machines Corp. v. Liberty Mutual Ins. Co.*, ___ F3d ___, 2004 WL 541126 at *4 (2nd Cir. (N.Y.) Mar. 19, 2004)(hereinafter "*IBM*"). Both district courts in this case perfunctorily determined that Georgia law applied in this case under New York's 'center of

gravity' choice of law approach. (R1-15; R3-31-7). However, the district courts skipped over a critical initial inquiry under New York conflict of law rules.

Under New York conflict of law rules, unless there is a substantive difference between New York's law and the other state's law (here Georgia) "a New York court will dispense with the choice of law analysis" and apply New York law. *IBM*, ___ F3d ___, 2004 WL 541126 at *4 (applying New York law in an insurance coverage dispute). In the present case there is no difference in the applicable substantive rules under both New York and Georgia law.

This case involves the interpretation of a motor vehicle liability insurance policy in the context of a third party's bodily injury claim caused by the use of the named insured's vehicle. In this context both New York and Georgia have the same substantive rules of law. Both New York and Georgia law require compulsory motor vehicle insurance. *Planet Ins. Co. v. Bright Bay Classic Vehicles, Inc.*, 75 N.Y.2d 394, 395, 553 N.E. 2nd 562, 563 (N.Y. 1990); *Anderson v. Southeastern Fidelity Ins. Co.*, 251 Ga. 556, 557, 307 S.E.2d 499, 500 (Ga. 1983).

When interpreting motor vehicle insurance contracts, both New York and Georgia share the same strong public policy that victims of motor vehicle accidents have recourse to insurance for the recovery of their damages. *Planet Ins. Co.*, 75 N.Y.2d 394 at 401, 553 N.E. 2nd 562 at 565; *Anderson*, 251 Ga. at 557, 307 S.E.2d at 500.

Also, when interpreting motor vehicle insurance contracts, both New York and Georgia adhere to the rule of construction that ambiguities in the insurance contract are to

be construed against the insurance company, as the drafter of the contract, and in favor person seeking coverage. *Greaves v. Public Service Mut. Ins. Co.*, 5 N.Y.2d 120, 125, 155 N.E.2d 390, 392 (N.Y. 1959)("We will keep in mind that this policy was written by the insurer and any ambiguity is to be resolved against it."); *Anderson*, 251 Ga. at 557, 307 S.E.2d at 500 (Georgia law).

Since both New York and Georgia share the same substantive rules and public policies in this case of motor vehicle insurance contract interpretation. New York's rule that a choice of law analysis *is not* engaged in unless there is a conflict in the substantive rules of New York and the other state involved, governs this case. *See IBM*, ___ F3d ___, 2004 WL 541126 at *4. Consequently, New York law applies to the issue raised by Redland regarding the interpretation and effect of its policy's definition of a 'covered auto'. *See id.*